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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1554

Glen H. Ferrell,

Petitioner,

vs.

State of South Carolina,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of South Carolina is Opinion No. 21107, filed January 7, 1980, reported at ___ S.C. ___, ___ S.E. 2d ___. This opinion is set out in full in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The Petitioner was convicted by a jury in the Circuit Court for the Thirteenth Judicial Circuit of South Carolina in Greenville, South Carolina, on February 6, 1978, of possession of phencyclidine (PCP), a schedule III controlled substance in violation of South Carolina Code Section 44-53-370. A timely Notice of Intention to Appeal to the South Carolina Supreme Court was filed on February 8, 1978. The case was docketed as 78-440. Briefs were filed and on May 21, 1979, the case was argued before the South Carolina Supreme Court. The Opinion of the South Carolina Supreme Court was filed on January 7, 1980. No Petition for Rehearing was filed with the South Carolina Supreme Court, although Rule 17, Section 2 of the South Carolina Supreme Court specifically provides for Petitions for Rehearing. Appendix A, page 18). The Petitioner

filed the Petition for Writ of Certiorari on April 4, 1980.

The Petitioner states that he seeks to invoke the jurisdiction of this Court pursuant to Title 28, United States Code Section 1257 (3). This Section provides that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari...where any right... is...claimed under the Constitution...." The Petitioner, by his failure to Petition for Rehearing, has failed to achieve the finality of State judgment required by 28 USC Section 1257 (3). (See Bateman v. Arizona, ___ U.S. ___, 50 L. Ed. 2d 32, 97 S. Ct. 1 (1976), New York Times Co. v. Gascalevich, __ U.S. ___, 58 L. Ed. 2d 25, 99 S. Ct. 6 (1978), Gorman v. Washington University, 316 U.S. 98, 86 L. Ed. 1300, 62 S. Ct. 962 (1942). This lack of

finality deprives this Court of jurisdiction to entertain the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

I.

Did the Supreme Court of South Carolina properly determine that under the Fourth Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment by application of the proper legal standard that there existed probable cause to arrest the petitioner?

II.

If probable cause existed to arrest the Petitioner for a drug law violation, was it removed by a brief pat-down of his external clothing, so as to render a second search constitutionally infirmed under the Fourth Amendment to the United

States Constitution as applied to the States through the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS

Respondent does not question the constitutional provisions applicable to this proceeding.

STATEMENT OF THE CASE

In the early afternoon of October 13, 1977, Sgt. Walter M. Parsons, an officer of the Greenville City Police Department specializing in narcotic investigations received information from a confidential informer (Tr. pp. 10-11, p. 35) that illicit drugs were being distributed by Mr. Phil Mason out of apartment #46, Westgate Manor. (Tr. p. 11). After an initial investigative visit to the apartment complex, a search warrant for #46 Westgate Manor was obtained. It was conceded that this warrant for the

apartment was valid. (See Opinion, South Carolina Supreme Court, State v. Ferrell, Brief of Petitioner, Appendix A at p. 3).

The informer also advised the police that Mr. Mason drove a gray Corvette which he usually parked out front (Tr. p. 13), that he had a "stash house" located off White Horse Road at Donaldson Center (Tr. p. 14) where he would go to pick up his drugs. The informer further told police that on that night Mr. Mason would "more than likely" drive the car to a location at Donaldson and pick up his drugs and bring them back and make a deal. (Tr. p. 14)

After obtaining the search warrant for the apartment, the police returned to the complex and observed a gray Corvette meeting the description supplied to them by the informant and parked in the location in conformity with the tip in the parking lot. The police went to

a location off White Horse Road approximately 1/2 mile away to plan the execution of the warrant. At that time a gray Corvette was seen proceeding down White Horse Road in the direction of Donaldson Center. (Tr. p. 15). There were two passengers in the car. (Tr. p. 38). To verify that this Corvette was the one belonging to Phil Mason, the police returned to the apartment complex and found the Corvette previously seen to be missing. (Tr. p. 16). The distance between the apartment and Donaldson Center is 10 to 12 miles. Twenty to thirty minutes after the gray Corvette was seen on White Horse Road, a gray Corvette, driven by Mr. Mason drove into the apartment parking lot from the direction of Donaldson Center. (Tr. p. 16). In the opinion of the officer this was sufficient time to make a trip to Donaldson Center and return. (Tr. p. 38).

Mr. Mason was known to police, having a prior record of possession of marijuana with intent to distribute. (Tr. p. 48). Petitioner was riding in this car as a passenger. (Tr. p. 16).

The police approached the car with guns drawn. (Tr. p. 42). The guns were holstered once the car was exited. (Tr. p. 61). They conducted a brief pat-down for weapons of Mr. Mason and the Petitioner. Any further search was postponed because of the misting rain, subzero temperature, dim lighting and the hour, 10:00 p.m. (Tr. p. 42,.p. 20). Mr. Mason told the police "feel free to search the car, there's nothing in it anyway." (Tr. p. 17). During a search of the car no drugs were found. (Tr. p. 42).

Although the police did not know the Petitioner prior to this occasion, the police had evidence prior to the search that he and Mr. Mason were not strangers.

The girlfriends of both men were in apartment #46 when the police entered the apartment. (Tr. p. 56).

The Petitioner was taken inside and asked to empty his pockets. A frisk search revealed an object in his pocket which the Petitioner then removed. It was a plastic bag containing 99 pills, which were determined to be PCP, phencyclidine. (Tr. pp. 45-46). The search of the apartment produced some residue and some paraphenalia. (Tr. p. 20). The Petitioner was arrested and charged with possession of phencyclidine with intent to distribute. The Petitioner was subsequently indicted by the Grand Jury for the Circuit Court of the Thirteenth Judicial Circuit of South Carolina in Greenville, South Carolina, on the charge of possession of phencyclidine (PCP), a schedule III controlled substance, in violation of South Carolina Code Section 44-53-370.

MATTER BY WHICH CONSTITUTIONAL QUESTIONS WERE RAISED

The constitutional question concerning validity of the search of the Petitioner was first raised by written motion of trial counsel to suppress the physical evidence which was a fruit of this search. This motion was timely heard in camera prior to the commencement of any testimony in this case before the presiding judge of the Court of General Sessions in Greenville County. (Tr. p. 8). After a hearing on the motion, the motion to suppress was denied. (Tr. p. 31). On appeal to the South Carolina Supreme Court exception was taken to the trial court's denial of the motion to suppress. The issue of the constitutionality of this search of the Petitioner was addressed by the South Carolina Supreme Court on review of the Petitioner's conviction. The Petitioner argues in his Petition for

Writ of Certiorari that this case is governed by the recent case of Ybarra v. Illinois, ___ U.S. ___, 48 U.S.L.W. 4023 (Nov. 28, 1979). The Petitioner, however, did not seek relief of the South Carolina Supreme Court to file an additional brief in light of Ybarra which was decided after his brief in this case was filed, nor did he Petition for Rehearing in light of Ybarra.

ARGUMENT

The Petitioner argues that the Petition for Certiorari should be granted because in South Carolina the courts have, in his view, determined that "mere presence" and "association" are deemed to be constitutionally sufficient to support probable cause. The Respondent has submitted that certiorari should not be granted because this Court lacks jurisdiction. Should it be determined that

jurisdiction exists, the Respondent would argue that certiorari is inappropriate where, as here, there was no supplemental brief in the South Carolina Supreme Court filed urging the Court to consider the case in light of Ybarra v. Illinois, ___ U.S. ___, 48 U.S.L.W. 4023 (Nov. 28, 1979), a case decided subsequent to the argument of this case before the South Carolina Supreme Court but prior to the decision of that Court, nor was there any Petition for Rehearing.

The South Carolina Sureme Court properly applied the legal principals developed by this Court. The opinion by the South Carolina Supreme Court expressly rejected the notion that mere presence or association are sufficient to establish probable cause. This is in accordance with the prior decisions of this Court in U.S. v. DiRe, 332 U.S. 581, 68 S. Ct. 222, 93 L. Ed. 210 (1948) and Sibron v. N.Y., 392 U.S. 40, 20 L. Ed. 2d 917, 88

S. Ct. 1889 (1968) and Ybarra v. Illinois, supra.

These cases stand for the proposition that probable cause is necessary to conduct a search, and that an articulable suspicion combined with a fear for the officer's safety is necessary for a pat-down for weapons by Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

Clearly association is one factor which may be considered in the determination of probable cause. See Annot. Narcotic-Arrest Without Warrant, 6 ALR Fed 724. The Petitioner seeks a third factual review of facts previously decided adversely to him. As stated by Justice White in his separate opinion, dissenting in part, concurring in part, in Sibron v. N.Y., supra,

> In acting upon its own findings and rejecting those of the lower state courts, this Court, sitting in the marble halls of the Supreme Court Building in Washington, D. C., should be most cautious...It is

> not only wise but imperative that where findings of the facts of reasonableness and probable cause are involved in such state cases, we should not overturn state court findings unless in the most extravagant and egregious errors. Sibron v. N.Y., 392 U.S. at 81-82.

The South Carolina Supreme Court correctly determined that probable cause to arrest and search the Petitioner existed.

> In dealing with probable cause ...as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160 at 175, 93 L. Ed. 1879, 69 S. Ct. 1302 (1947). Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162, 69 L. Ed. 543, 555, 45 S. Ct. 280 (1924). Draper v. U.S., 358 U.S. 307 at 314.

The facts of this case were such that would lead the police to believe that a

crime had been or was being committed and that the Petitioner was a participant. The police had detailed information from a reliable informant which indicated that "more likely than not" a drug deal would occur on this night. The informant described the scenario of such a deal in detail. Drug deals unlike other crimes, such as the possessory offense in Ybarra, supra, necessarily involve more than one individual. The police observed activity which directly and completely validated the information in the tip. The police had probable cause to arrest and search the Petitioner.

The Petitioner seems to argue that the Terry pat-down in the parking lot was proper, but that once accomplished, no further search could take place. The purpose of Terry is to protect the police, the fact that the pat-down revealed no weapons did not vitiate the probable

cause to search for drugs. The fact that drugs were not found in the car increased the probability that they were located on the persons of Mason and/or the Petitioner. Probable cause existed, the search was proper, and the fruits of this search were properly admitted into evidence against the Petitioner.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that Petitioner's Petition for a Writ of Certiorari should be denied.

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APPENDIX
Rule 17, Section 2
SUPREME COURT RULES

Petitions for rehearing must be filed before the judgment of this Court has been remitted to the Court below. The petition for that purpose, together with five copies thereof, must be filed with the Clerk, stating particularly the points supposed to have been overlooked or misapprehended by the Court, without argument, with a certificate from some counsel not concerned in the case that there is merit in such grounds, accompanied with a consent in writing signed by the parties and not by counsel, that the stay of remittitur shall be granted upon condition that the status of the property involved in the case, where specific property is involved, shall not be disturbed until after the final determination of the case. Upon the filing of the required petition and copies, the Clerk will stay the remittitur, forward

the original petition to the Justice who rendered the opinion, and a copy to each of the other Justices and file a copy with the record. The Justice to whom the original is forwarded will take the necessary steps in having the petition passed upon.